No. 11144

United States

Circuit Court of Appeals

For the Ninth Circuit.

PETER L. YOUNG,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

Transcript of Record

UPON APPEAL FROM THE SUPREME COURT FOR THE TERRITORY OF HAWAII

Rotary Colorprint, 661 Howard Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

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and

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W. Z. FAIRBANKS,
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and

J. E. PARKS,
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Honolulu, T. H.,
Attorneys for Defendant in Error. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

January Term, 1942

Criminal No. 16633

Abortion

THE TERRITORY OF HAWAII

vs.

PETER L. YOUNG and HILDA NOZAWA,
Defendants.

INDICTMENT

The Grand Jury of the First Judicial Circuit of the Territory of Hawaii do present that Peter L. Young and Hilda M. Nozawa, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court on the 8th day of August, 1942, maliciously, wilfully, unlawfully and feloniously, and without lawful justification, did use and employ an instrument and a certain noxious substance, a more particular description of which are to the Grand Jury unknown, by then and there forcing said instrument and said noxious substance into the body and womb of a certain woman, to-wit, one Rose Dolim, she, the said Rose Dolim being then and there pregnant and not quick with child, with intent on the part of them, the said Peter L. Young and Hilda M. Nozawa, then and there and thereby to use the said instrument and noxious substance as aforesaid to produce and pro-

cure the miscarriage of the said Rose Dolim, and that the said use of the said instrument and noxious substance was not for the purpose of saving the life of her, the said Rose Dolim, and did then and there and thereby commit the crime of abortion, contrary to the form of the statute in such case made and provided. [4]

A true bill found this 15th day of October, 1942.

M. E. McKENNEY,
Foreman of the Grand Jury.

CHAS. E. CASSIDY,
Public Prosecutor of the City and County of Honolulu.

Indictment presented and filed at 3:44 o'clock P. M., October 15, 1942. O. Sezenevsky, Clerk.

Arraignment—1st Def. Oct. 17, 1942. 2nd Def., Oct. 16, 1942.

Plea—Not guilty (both Def'ts), Oct. 23, 1942.

Copy of the within indictment before arraignment furnished 2 Defendants.

PUBLIC PROSECUTOR,
City and County of Honolulu.

[Endorsed]: Filed Sept. 6, 1945. [3]

[Title of Court and Cause.]

INSTRUCTIONS REQUESTED BY THE TERRITORY OF HAWAII

The Territory of Hawaii requests the Court to give to the Jury in the above entitled action, the following instructions numbered from 1 to 10, inclusive.

Dated at Honolulu, T. H., this 19th day of March, A.D. 1943.

TERRITORY OF HAWAII.
By JOHN E. PARKS,
Assistant Public Prosecutor.

TERRITORY'S INSTRUCTION No. 1

Gentlemen of the Jury, I instruct you that the defendant in this case stands charged in the indictment with the crime of abortion.

You are the exclusive judges of the facts in this case and the credibility of the witnesses but the law you must take from the court as given you in these instructions to be the law notwithstanding any opinion you might have as to what the law is or should be.

Given by Agreement.

A. M. CRISTY,
Judge. [8]

TERRITORY'S INSTRUCTION No. 2

I further instruct you that abortion is defined in our statutes as follows:

> "Whoever maliciously, without lawful justification, administers, or causes or procures to be administered any poison or noxious thing to a woman when with child, in order to produce her miscarriage, or maliciously uses any instru-

ment or other means with like intent, shall, ~~if the woman be then quick with child, be punished . . . and~~ if she be then not quick with child, ~~shall~~ be punished . . ."

Sec. 6232—R. L. of H., 1935.

Given as modified by Agreement.

A. M. CRISTY,
Judge. [9]

TERRITORY'S INSTRUCTION No. 3

I further instruct you that "malice" is defined in our statutes as follows:

"Malice in respect to the commission of any offense, except in cases where it is otherwise expressly provided or plainly intended, includes not only hatred, ill-will and desire of revenge; but, ~~cruelty of disposition or temper; and~~ also a motive or desire of gain or advantage to the offender or another; or of doing a wrong or injury to any person or persons, or to the public. It also includes the acting with a heedless, reckless disregard or gross negligence of the life or lives, the health or personal safety, or legal rights or privileges of another or others, many or few, known or unknown; also the wilful violation of a legal duty or obligation, and wilful contravention of law."

Sec. 5302, R. L. of H., 1935.

Given as modied by Agreement.

A. M. CRISTY,
Judge. [10]

TERRITORY'S INSTRUCTION No. 4

You are instructed that it is no defense under the law to the crime of abortion as charged in the indictment that Rose Dolim solicited, requested or consented to have an abortion performed upon her body even if you so find the fact to be.

Given Over Objection.

A. M. CRISTY,
Judge. [11]

TERRITORY'S INSTRUCTION No. 5

The jury is instructed that an actual miscarriage is not necessary under the statutes with which the defendant is charged in this case. The crime is complete if a person maliciously, without lawful justification, administers any poison or noxious thing to a woman, when pregnant, in order to procure her miscarriage, or maliciously uses an instrument on a woman, when pregnant, with intent to procure her miscarriage. It is wholly immaterial whether or not a miscarriage actually results.

Sec. 6232, R. L. of H., 1935. 1 Amer. Jur. 136, Sec. 12.

Given Over Objection.

A. M. CRISTY,
Judge. [12]

TERRITORY'S INSTRUCTION No. 6

The court further instructs you that our statute also provides that every one shall be presumed to in-

tend the natural and plainly probable consequences of his acts.

Sec. 5358, R. L. of H., 1935.

Given Over Objection.

A. M. CRISTY,
Judge. [13]

TERRITORY'S INSTRUCTION No. 8

The court further instructs you, gentlemen of the jury, that you are the exclusive judges of the credibility of the witnesses, of the weight of the evidence, and of the facts in this case. It is your exclusive right to determine from the appearance of the witnesses on the witness stand, their manner of testifying, their apparent candor or frankness, or lack thereof, which witness or witnesses are more worthy of credit, and to give weight accordingly. In determining the weight to be given the testimony of the witnesses you are authorized to consider their relationship to the parties, if any, their interest, if any, in the result of this case, their temper, feeling or bias, if any has been shown, their demeanor on the witness stand, their means and opportunity of information, and the probability or improbability of the story told by them.

If you find and believe from the evidence that any witness in this case has knowingly and wilfully sworn falsely to any material fact in this trial or that any witness has knowingly and wilfully exaggerated or suppressed any material fact or circumstance in this trial for the purpose of deceiving, mis-

leading or imposing upon you, then you have a right to reject the entire testimony of such witness except insofar as the same is corroborated by other credible evidence or believed by you to be true.

Given by Agreement.

A. M. CRISTY,
Judge. [14]

TERRITORY'S INSTRUCTION No. 9

I further instruct you that the burden of proof is upon the Territory and the law presumes the defendant to be innocent, and this presumption continues and attends him at every stage of the case until it has been overcome by evidence which proved him guilty to your satisfaction and beyond a reasonable doubt. And in this connection, I instruct you that the doubt which will entitle the defendant to an acquittal must be a reasonable doubt, not a conjured-up doubt, such a doubt as you might conjure up to acquit a friend, but a doubt that you could give a reason for.

A reasonable doubt is not a slight doubt, not a probable doubt, not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainly of the guilt of the accused, because everything relating to human affairs and depending upon *mortal* evidence is open to conjectural or imaginary doubt, and because absolute certainty is not required by law. The real question is whether after hearing the evidence and from the evidence you have or have not an abiding belief, amounting to a moral certainty that the defendant is guilty

and if you have such belief so formed, it is your duty to convict and if you have not such belief so formed it is your duty to acquit.

Given Over Objection.

A. M. CRISTY,
Judge. [15]

TERRITORY'S INSTRUCTION No. 10

I further instruct you that in connection with the charge of abortion you may bring in, one of the following verdicts as the facts and circumstances in evidence under the law as given you in these instructions may warrant:

1. Guilty as charged; or
2. Not guilty.

Given by Agreement.

A. M. CRISTY,
Judge. [16]

TERRITORY'S INSTRUCTION No. 11

You are instructed that the burden is on the Territory to prove beyond a reasonable doubt that the defendant's treatment of Rose Dolim was not for the purpose of saving her life.

Given by Agreement.

A. M. CRISTY,
Judge.

[Endorsed]: Filed March 22, 1943. [17]

[Title of Court and Cause.]

REQUESTED INSTRUCTIONS ON BEHALF OF DEFENDANT

Peter L. Young, defendant above named, requests this Honorable Court to give to the jury in the above entitled court and cause the following instructions numbered from 1 to ...., inclusive.

Dated: Honolulu, T. H., this 18th day of March, 1943.

PETER L. YOUNG,
Defendant,
By J. V. ESPOSITO,
His Attorney. [19]

INSTRUCTION No. 2

I instruct you that the issue which you are to try is that presented by the indictment, and the defendant's plea of not guilty in this case. For be it remembered that the plea of not guilty puts in issue and requires the prosecution to prove each and every material allegation in the indictment beyond all reasonable doubt.

Given by Agreement.

A. M. CRISTY,
Judge. [20]

INSTRUCTION No. 3

The indictment in this case is a mere accusation and is not of itself any evidence, not the slightest, of the defendant's guilt, and no juror should per-

mit himself to be to any extent influenced because or on account of the indictment against the defendant. You are instructed that the defendant is presumed by the law to be innocent of the crime charged against him, in each and all its parts, and this presumption shields and protects him throughout each and every stage of the trial until overcome by satisfactory evidence, which convinces you of his guilt as charged beyond all reasonable doubt.

Given by Agreement.

A. M. CRISTY,
Judge. [21]

INSTRUCTION No. 4

Moreover, I instruct you that this presumption of innocence is not a mere form to be disregarded by you at pleasure, but it is an essential, substantial part of the law of the land, and is binding upon you in this case, and it is your duty to give the defendant the full benefit of this presumption and to acquit him unless, as I have already stated, the evidence satisfies you of his guilt beyond all reasonable doubt.

Given by Agreement.

A. M. CRISTY
Judge. [22]

INSTRUCTION No. 6

The burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts

necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.

Given by Agreement.

A. M. CRISTY
Judge. [23]

INSTRUCTION No. 7

Under the law no jury can convict a person charged with crime upon mere suspicion, however strong, or simply because there is a preponderance of all the evidence in the case against him, or simply because there are strong reasons to suspect him guilty. What the law requires before a person can be convicted of crime is not suspicion, not mere probabilities, but proof which excludes all reasonable doubt of his innocence.

Given by Agreement.

A. M. CRISTY
Judge. [24]

INSTRUCTION No. 8

I further instruct you, as a matter of law, that one accused and on trial charged with the commission of a crime may testify in his own behalf, or not, as he pleases. You are instructed that when a defendant does testify in his own behalf, then you have no right to disregard his testimony merely because he is accused of crime; that when he does

so testify he at once becomes the same as any other witness, and his credibility is to be tested by, and subjected to, the same tests as are legally applied to any other witness.

7 LRA (N S) 1149

Given by Agreement.

A. M. CRISTY
Judge. [25]

INSTRUCTION No. 12

I instruct you that a duly licensed physician may under our statutes lawfully procure the miscarriage of a woman pregnant with child by any means appropriate and reasonable for that purpose whether directly or indirectly applied, if in doing so, he acts in good faith for the preservation of the life ~~or health~~ of such woman, and if you find from all the evidence that the defendant did act in such good faith to preserve the life ~~or health~~ of Rose Dolim, then you must find the defendant not guilty.

6233.

Given by Agreement.

A. M. CRISTY
Judge.

[Endorsed]: Filed March 22, 1943. [26]

[Title of Court.]

Criminal No. 16633

Abortion

TERRITORY OF HAWAII,

vs.

PETER L. YOUNG and HILDA M. NOZAWA,
Defendants.

At Term. 2:30 o'clock P.M., Friday, February 19, 1943.

Present: Hon. Carrick H. Buck, First Judge, Presiding. O. Sezenevsky, Clerk. S. H. Minns, Reporter.

COURT'S RULING ON MOTION FOR SEVERANCE AND SEPARATE TRIAL

John E. Parks, Esq., Assistant Public Prosecutor.

Joseph V. Esposito, Esq., Counsel for Peter L. Young, one of the Defendants.

The Court granted the Motion of Peter L. Young, one of the defendants, herein, by J. V. Esposito, his attorney, for Severance and Separate Trial, filed herein on the 23rd day of October, 1942.

Counsel for the Territory excepted to the Court's ruling.

By Order of the Court.

O. SEZENEVSKY,
Clerk. [27]

[Title of Court.]

Friday, Feb. 26, 1943

At Term—2:00 p.m.

Present: Hon. A. M. Cristy, Second Judge, Presiding. D. M. Feder, Clerk. R. N. Linn, Reporter.

[Title of Cause.]

Counsel: C. E. Cassidy, Esq., Public Prosecutor. J. V. Esposito, Esq., for Defendants. Defendants in Person.

Defendants were called to the Bar and after being questioned pleaded Not Guilty to the charge, which plea was duly noted and entered by the Court.

The case was set for trial on March 15 at 9:00 a.m.

By the Court.

/s/ D. M. FEDER
Clerk.

Tuesday, March 16, 1943

At Term—9:00 O'Clock A.M.

Present: The Court. R. N. Linn, Reporter. Counsel: Same.

TRIAL BY JURY

Counsel being ready to proceed with the trial of the above entitled case, the Court instructed the Clerk to draw the jury:

1. Paul K. Strauch
2. J. C. Richardson
3. Wesley Rickard
4. E. A. Brenner
5. Ching Fat
6. Robert Edgar
7. A. R. Wyeth
8. A. L. De Crow
9. Otto C. Meyer
10. William E. Brede
11. Lawrence Santos
12. J. G. Walsh

who were duly sworn in together with the other jurors in the Courtroom.

Counsel examined the jurors and passed them for cause.

Mr. John E. Parks, counsel for prosecution, exercising his first peremptory challenge, excused Mr. Ching Fat, who was replaced by (13) Mr. Chun Sung Ching.

Counsel for defendant, exercising his first peremptory challenge, excused Mr. Robert Edgar, who was replaced by (14) Paul H. Anderson.

Counsel for prosecution, exercising his second peremptory challenge, excused Mr. Chung Sung Ching, who was replaced by (15) Frank M. Almeida.

Counsel for defendant, exercising his second peremptory challenge, excused Mr. Lawrence Santos, who was replaced by (16) A. Burger.

Counsel for prosecution, exercising his third and last peremptory challenge, excused Mr. E. A. Brenner, who was replaced by (17) Wilbur M. Spencer.

Counsel for defendant stated that the jury was satisfactory.

The Court instructed the Clerk to swear in the jury to try the case:

1. Paul K. Strauch
2. J. C. Richardson
3. Wesley Rickard
4. Wilbur M. Spencer
5. Frank M. Almeida
6. Paul H. Anderson
7. A. R. Wyeth
8. A. L. De Crow
9. Otto C. Meyer
10. William E. Brede
11. A. Burger
12. J. G. Walsh

At 9:52 a.m. the Court recessed. [29]

At 9:58 a.m. the Court reconvened, whereupon

counsel for prosecution delivered his opening statement to the jury and disclosed what the prosecution intended to prove in this case.

Counsel for defendant reserved his opening statement until after the close of prosecution's case.

At 10:09 a.m. counsel for prosecution called as a witness (1) Miss Rose Dolim, who, upon being duly sworn, testified.

Counsel for prosecution offered in evidence the following exhibits which were received by the Court and marked as follows:

Prosecution's Exhibit "A"

Savings Account Pass Book #14277 in the name of Mrs. Rose D. Kirkelie showing a withdrawal on August 8, 1942, of $60.00.

Prosecution's Exhibit "B"

Marriage License taken out in the names of Joseph Franklin Sudduth and Rose Dolim issued in Honolulu, T. H., on July 30, 1942, by Leila L. Rankin, Marriage License Agent.

Prosecution's Exhibit "C"

Letter, dated Aug. 8, 1942, from Dr. Peter L. Young addressed—To Whom It May Concern: This certifies that Rose Dolim is under my medical supervision for menorrhagia. Yours truly—Dr. P. L. Young.

Prosecution's Exhibit "D"

Small Box of Pills with pencilled notation "2 every 2 hours" and also a small envelope containing 4 small green pills with the notation on the front of said envelope—"1 tablet every 3 hrs."

Prosecution's Exhibit "E"

Wyeth's Ergoklomin purified solution of Ergot and also a small box containing 6 pills with the notation—"1 tablet every 3 hours." [30]

Prosecution's Exhibit "F"

Bottle of "Bo-car-al" being a Hygenic Powder and a non-irritating astringent, deordorant and manufactured by Sharp & Dohme.

At 10:55 a.m. the Court recessed.

At 11:02 a.m. the Court reconvened, whereupon counsel for prosecution offered in evidence,

> Bottle of Cough Mixture with the following directions—"2 teaspoons every 2 hours" and bearing Dr. Peter L. Young's name, business address and office hours thereon,

which was received by the Court and marked Prosecution's Exhibit "G."

At 11:15 a.m. cross examination

At 11:30 a.m. the Court recessed.

At 1:30 p.m. the Court reconvened; further cross examination.

At 2:12 p.m. the Court recessed.

At 2:17 p.m. the Court reconvened, whereupon counsel for prosecution called as a witness (2) Mrs. Olive Dolim Rodrigues, who, upon being duly sworn, testified.

At 2:30 p.m. cross examination.

At 2:42 p.m. redirect examination.

At 2:43 p.m. recross examination.

At 2:45 p.m. counsel for prosecution called as a

witness (3) Detective Anthony Paul, who, upon being duly sworn, testified.

At 2:55 p.m. the Court recessed.

At 3:00 p.m. the Court reconvened, whereupon counsel for prosecution offered in evidence,

> Statement made by Miss Rose Dolim at Pauahi [31] 2 Ward, Room 214, Queen's Hospital at 4:00 p.m. on August 22, 1942,

which was received by the Court and marked Prosecution's Exhibit "H."

At 3:07 p.m. cross examination.

At 3:13 p.m. redirect examination.

At 3:14 p.m. recross examination.

At 3:15 p.m. re-direct examination.

At 3:16 p.m. re-cross examination.

At 3:18 p.m. the Court continued the further trial of this case until Wednesday, March 17, 1943 and adjourned at term.

By the Court.

/s/ L. P. HOLT
Clerk.

Wednesday, March 17, 1943

At Term—9:00 O'Clock A.M.

Present: The Court. R. N. Linn, Reporter. Counsel: Same.

FURTHER TRIAL

Counsel being ready to proceed with the further trial of the above entitled case, stipulated the presence of the jury and the defendant.

At 9:01 a.m. counsel for prosecution called as a witness (4) Dr. Gilbert Halpern, who, upon being sworn, testified.

At 9:15 a.m. cross examination.

At 9:39 a.m. counsel for prosecution called as a witness (5) Itsuko Murakami, who, upon being duly sworn, testified. [32]

At 9:43 a.m. cross examination.

The witness was requested to read the statement of Miss Rose Dolim (heretofore offered as Prosecution's Exhibit "H") from his shorthand notes while counsel checked the transcript.

At 9:46 a.m. further cross examination.

At 9:48 a.m. counsel for prosecution called as a witness (6) Police Officer Albert Felix, who, upon being duly sworn, testified.

Counsel for prosecution offered for Identification and in Evidence respectively the following exhibits which were received by the Court and marked as follows:

Prosecution's Exhibit "I" for Identification

Statement of Dr. Peter L. Young dated Aug. 22, 1942, made at the Detective Division of the Honolulu Police Department.

Prosecution's Exhibit "J"

Orange colored card purporting to be the "Patient Card" of Miss Rose Dolim, 1261 Central St., taken from the files of Dr. Peter L. Young.

At 10:01 a.m. cross examination.

At 10:03 a.m. the Court recessed.

At 10:19 a.m. the Court reconvened, whereupon counsel for prosecution called as a witness (7) Police Officer Robert K. Kadota, who, upon being duly sworn, testified.

At 10:24 a.m. the Court recessed to allow counsel for defendant to check the defendant's statement to the Police.

At 10:53 a.m. the Court reconvened; cross examination. [33]

Counsel for defendant asked leave of the Court to have the witness read from his shorthand notes and that counsel check the transcript relative to Dr. Young's statement to the Police. The Court granted the request. Counsel for defendant called the court's attention to an apparent discrepancy in the words "aerial hemmorrhage" appearing on page 7 of said statement.

At 11:29 a.m. the witness concluded reading his shorthand notes at which time counsel for prosecution offered the statement in evidence. The Court received the exhibit in evidence and gave it the same identifying mark, to-wit, Prosecution's Exhibit "I."

At 11:30 a.m. counsel for prosecution rests.

At 11:31 a.m. the Court continued the further trial of this case until Thursday, March 18, 1943, at 9:00 o'clock a.m. and adjourned at term.

By the Court.

/s/ JOSEPH L. COCKETT
Clerk

Thursday, March 18, 1943

At Term—9:00 O'Clock A.M.

Present: The Court. R. N. Linn, Reporter. Counsel: Same.

FURTHER TRIAL

Counsel being ready to proceed with the further trial of the above entitled case, stipulated the presence of the jury and the defendant.

At 9:01 a.m. counsel for defendant delivered his opening statement to the jury.

At 9:05 a.m. counsel for defendant called as a [34] witness (8) Dr. Peter L. Young, who, upon being duly sworn, testified.

At 9:48 a.m. cross examination

At 10:02 a.m. the Court recessed.

At 10:10 a.m. the Court reconvened; further cross examination.

At 11:27 a.m. the Court recessed.

At 1:30 p.m. the Court reconvened, whereupon counsel for defendant called as a witness (9) Dr. Joseph W. Lam, who, upon being duly sworn, testified.

At 1:47 p.m. cross examination.

At 1:56 p.m. redirect examination.

At 2:06 p.m. the Court interrogated the witness.

At 2:09 p.m. recross examination.

At 2:13 p.m. re-direct examination.

At 2:14 p.m. counsel for defendant called as a witness (10) Dr. Hong Quon Pang, who, upon being duly sworn, testified.

At 2:24 p.m. cross examination.

At 2:30 p.m. the Court interrogated the witnesss.

At 2:31 p.m. redirect examination.

At 2:33 p.m. recross examination.

At 2:34 p.m. the Court recessed.

At 2:38 p.m. the Court reconvened, whereupon Dr. Peter L. Young resumed the witness stand under further cross examination.

At 3:30 p.m. the Court continued the further [35] trial of this case until Friday, March 19, 1943, at 9:00 o'clock a.m. and adjourned at term.

By the Court.

/s/ L. R. HOLT
Clerk.

Friday, March 19, 1943

At Term—9:00 O'Clock A.M.

Present: The Court. R. N. Linn, Reporter. Counsel: Same.

FURTHER TRIAL

Counsel being ready to proceed with the further trial of the above entitled case, stipulated the presence of the jury and the defendant.

At 9:01 a.m. Dr. Peter L. Young resumed the witness stand under further cross examination.

At 9:12 a.m. redirect examination.

Counsel for defendant offered for Identification,

Five sheets consisting of pages 291, 292, 293, 294, 295, 296, 297, 298, 299 and 300 taken from the text book "Midwifery by Ten Teachers,"

edited by Comyns Berkeley, H. Russell Andrews, J. S. Fairbairn and published by Edward Arnold & Co.—London—1925,

which was received by the Court and marked Defendant's Exhibit "1" for Identification.

At 9:35 a.m. recross examination.

At 9:36 a.m. defense rests.

At 9:37 a.m. the Court called counsel to the bench to discuss the question of instructions.

At 9:38 a.m. the Court excused the jury until Monday, March 22, 1943, at 8:30 o'clock a.m. and requested counsel to meet with the Court at 10:00 a.m. this day to settle the matter of instructions.

INSTRUCTIONS

At 10:00 a.m. counsel met with the Court in chambers to settle the instructions in this case. The following instructions were taken up and ruled upon, to-wit:

Prosecution's Requested Instructions:

No. 1—Given by agreement.

No. 2—Given by agreement.

No. 3—Given by agreement.

No. 4—Given over objection.

No. 5—Given over objection.

No. 6—Given over objection.

No. 7—Withdrawn.

No. 8—Given by agreement.

No. 9—Given over objection.

No. 10—Given by agreement.

Defendant's Requested Instructions:

No. 1—Refused.

No. 2—Given by agreement.

No. 3—Given by agreement.

No. 4—Given by agreement.

No. 5—Refused as covered.

No. 6—Given by agreement.

No. 7—Given by agreement.

No. 8—Given by agreement.

No. 9—Withdrawn.

No. 10—Refused.

No. 11—Refused.

No. 12—Given by agreement as modified.

No. 13—Withdrawn.

By the Court.

/s/ L. R. HOLT
Clerk.

Monday, March 22, 1943

At Term—8:30 O'Clock A.M.

Present: The Court. R. N. Linn, Reporter. Counsel: Same.

FURTHER INSTRUCTIONS

Counsel for defendant submitted Defendant's Requested [37] Instruction #10 as modified with the elimination of the words "or health."

Counsel for prosecution submitted Prosecution's Requested Instruction #11 which was received and marked—Given by Agreement in lieu of Defendant's Instruction #10.

FURTHER TRIAL

Counsel being ready to proceed with the further trial of the above entitled case, stipulated the presence of the jury and the defendant.

At 8:37 a.m. Mr. John E. Parks, counsel for prosecution, delivered his opening argument to the jury.

At 9:19 a.m. counsel for prosecution concluded his argument to the jury.

At 9:20 a.m. the Court recessed.

At 9:25 a.m. the Court reconvened, whereupon counsel for defendant argued.

At 10:37 a.m. counsel for defendant concluded his argument to the jury, whereupon the Court recessed.

At 10:42 a.m. the Court reconvened, whereupon counsel for prosecution delivered his closing argument to the jury.

At 11:04 a.m. upon the conclusion of counsel for prosecution's argument, the Court read the instructions to the jury.

At 11:17 a.m. the Court concluded the reading of the instructions to the jury, whereupon counsel

for defendant excepted to the giving of Prosecution's [38] Requested Instructions numbered 4, 5, 6 and 9 and further excepted to the Court's refusal to give Defendant's Requested Instructions numbered 1, 5 and 11.

At 11:19 a.m. the Court instructed the Clerk to take the jury to lunch and immediately upon its return to start its deliberations in the Courtroom of the Second Division.

At 12:15 p.m. the jury returned from lunch and started its deliberation.

At 1:53 p.m. the jury returned the following verdict:

> We the Jury in the above entitled cause, find the Defendant Guilty as charged.
>
> /s/ PAUL H. ANDERSON
> Foreman.

Honolulu, T. H., March 22nd, 1943.

The Court ordered the Verdict filed.

Counsel for defendant excepted to the verdict as being contrary to the law, the evidence and the weight of the evidence and gave notice of appeal and his intention to sue out a Writ of Error.

At 1:55 p.m. the Court adjourned at term.

By the Court.

/s/ L. P. HOLT
Clerk. [39]

In the Supreme Court of the Territory of Hawaii

No. 2544

TERRITORY OF HAWAII,
Defendant in error,

vs.

PETER L. YOUNG,
Plaintiff in error.

APPLICATION FOR WRIT OF ERROR

To the Clerk of the Supreme Court:

Please issue a writ of error in the above case to the Clerk of the Circuit Court, First Circuit, Territory of Hawaii, on behalf of said defendant, returnable to the Supreme Court.

Dated: June 18, 1943.

PETER L. YOUNG,
By /s/ FRED PATTERSON
/s/ E. J. BOTTS
His Attorneys

[Endorsed]: Filed June 19, 1943. [41]

[Title of Supreme Court and Cause.]

WRIT OF ERROR

Territory of Hawaii, Greeting:

To the Clerk of the Circuit Court of the First Circuit, Territory of Hawaii:

Application having been made on behalf of Peter L. Young for a Writ of Error in the above entitled

cause, you are commanded forthwith to send to the Supreme Court the record in said cause.

Witness the Honorable Samuel S. Kemp, Chief Justice of the Supreme Court, this 19 day of June, 1943.

/s/ CHAS. H. K. HOLT
Clerk of the Supreme Court

The execution of the above Writ of Error appears by the certified record attached hereto.

Dated: Honolulu, T. H., August 14, 1943.

/s/ SYBIL DAVIS
Clerk, First Circuit Court,
Territory of Hawaii. [44]

I hereby certify that on the 19th day of June, 1943, I received the original and copies of Application for Writ of Error, Writ of Error, and Assignment of Errors in the above entitled cause.

/s/ JOHN R. DESHA
Asst Public Prosecutor

[Endorsed]: Filed June 19, 1943. [45]

[Title of Supreme Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now Peter L. Young, Plaintiff in Error, and files an assignment of errors upon which he

will rely on appeal to the Supreme Court of the Territory of Hawaii.

I.

The Court erred in sustaining prosecution's objection to question asked Rose Dolim, complaining witness, by defendant on cross-examination, as follows:

Question: . . . Were you arrested for fornication, for a crime?

Mr. Parks: That is objected to . . .

The Court: Objection sustained.

To which ruling defendant excepted (Tr. p. 45-46).

II.

The Court erred in overruling motion by defendant to strike certain evidence adduced when Anthony Paul, a police officer, was called by the prosecution. (Tr. p. 95). Having testified on direct examination that after defendant was arrested, he was ordered to discharge him from custody, he was asked on cross-examination if he was not discharged because the police believed the defendant's story and not the complaining witness' story. The colloquy follows:

Question: Isn't it a fact that he was discharged because he was treating her for hemorrhagia, and whether an abortion happened it was for saving life?

Answer: No sir, because we suspected him of being one of several abortionists in this town, and . . . (interrupted).

Mr. Esposito: I move that that be stricken as not responsive (Tr. p. 96).

Said motion was denied and exception then and there duly taken.

III.

The Court erred in overruling objection to question asked defendant on cross-examination by the prosecution in the following proceeding:

Question: Have you ever been convicted of drunkenness?

Answer: Yes, once; once in a lifetime.

Question: And was that right after this case? Was that right after Rose Dolim went to the hospital?

Mr. Esposito: Your Honor, I object . . .

The Court: Objection overruled.

Answer: About a month after . . .

Question: That you were convicted of drunkenness? Isn't it a fact, doctor, that the abortion did not become inevitable until after you had gotten the $150.00? (Tr. p. 289-290)

Defendant's objection to said question being overruled, the defendant then and there did except. [47]

IV.

The Court erred in instructing the jury, at the request of the prosecution, as follows:

Territory's Instruction No. 4

You are instructed that it is no defense under the law to the crime of abortion as charged in the indictment that Rose Dolim solicited, requested or

consented to have an abortion performed upon her body even if you so find the fact to be.

To the giving of the instruction above set out, the defendant, at the conclusion of the charge of the Court, in the presence of the jury and before the jury retired, duly noted an objection.

V.

The Court erred in instructing the jury, at the request of the prosecution, as follows:

Territory's Instruction No. 5

The jury is instructed that an actual miscarriage is not necessary under the statute with which the defendant is charged in this case. The crime is complete if a person maliciously, without lawful justification, administers any poison or noxious thing to a woman, when pregnant, in order to procure her miscarriage, or maliciously uses an instrument on a woman, when pregnant, with intent to procure her miscarriage. It is wholly immaterial whether or not a miscarriage actually results.

Sec. 6232, R. L. of H. 1935. 1 Amer. Jur. 136, Sec. 12.

To the giving of the instruction above set out, the defendant, at the conclusion of the charge of the Court, in the presence of the jury and before the jury retired, duly noted an exception. [48]

VI.

The Court erred in instructing the jury, at the request of the prosecution, as follows:

Territory's Instruction No. 6

The court further instructs you that our statute also provides that everyone shall be presumed to intend the natural and plainly probable consequences of his acts.

Sec. 5358, R. L. of H., 1935.

To the giving of the instruction above set out, the defendant, at the conclusion of the charge of the Court, in the presence of the jury and before the jury retired, duly noted an exception.

VII.

The Court erred in instructing the jury, at the request of the prosecution, as follows:

Territory's Instruction No. 9

I further instruct you that the burden of proof is upon the Territory and the law presumes the defendant to be innocent, and this presumption continues and attends him at every stage of the case until it has been overcome by evidence which proves him guilty to your satisfaction and beyond a reasonable doubt. And in this connection, I instruct you that the doubt which will entitle the defendant to an acquittal must be a reasonable doubt, not a conjured-up doubt, such a doubt as you might conjure up to acquit a friend, but a doubt that you could give a reason for.

A reasonable doubt is not a slight doubt, not a probable doubt, not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt

of the absolute certainty of the guilt of the accused, because everything relating to human affairs and depending upon moral evidence is open to conjectural or imaginary doubt, and because absolute certainty is not required by law. The real question is whether after hearing the evidence and from the evidence [49] you have or have not an abiding belief, amounting to a moral certainty that the defendant is guilty and if you have such belief so formed, it is your duty to convict, and if you have not such belief so formed it is your duty to acquit.

To the giving of the instruction above set out, the defendant, at the conclusion of the charge of the Court, in the presence of the jury and before the jury retired, duly noted an exception.

VIII.

The Court erred in refusing to give defendant's requested instruction No. 1, reading as follows:

Instruction No. 1

You are instructed to find the defendant, Peter L. Young, not guilty.

IX.

The Court erred in refusing to give defendant's requested instruction No. 5, reading as follows:

Instruction No. 5

A reasonable doubt is that state of the mind which after a full comparison and consideration of all of the evidence both for the prosecution and

the defense, leaves the minds of the jury in that condition that they cannot say that they feel an abiding faith amounting to a moral certainty from the evidence in the case, that the defendant is guilty of the crime as laid in the indictment. If you have such doubt and if your conviction of the defendant's guilt as laid in the indictment does not amount to a moral certainty from the evidence in the case, then you must find the defendant not guilty.

X.

The Court erred in refusing to give defendant's requested instruction No. 11, reading as follows:

Instruction No. 11

I instruct you that the statutes [50] on abortion are intended to prevent and punish the destroying of embryo human life, the germs of human life before birth, in the course of nature, and would not apply to acts to procure the miscarriage of a woman having a dead fetus in her womb.

Com. of Mass. v. Brown, 121 Mass. 69.

Wherefore, the said Plaintiff-in-error prays that said above entitled cause may be reversed and remanded with instruction to the trial court as to further proceedings, and for such other and further relief as may be proper in the premises.

PETER L. YOUNG
/s/ By FRED PATTERSON
/s/ E. J. BOTTS
His Attorneys

NOTICE

To the Prosecuting Attorney, City and County of Honolulu, Territory of Hawaii:

You are hereby notified that application for a writ of error in the above entitled matter has been filed.

/s/ FRED PATTERSON
/s/ E. J. BOTTS
Attorneys for Plaintiff in Error.

Dated June 19th, 1943.

[Endorsed]: Filed June 19, 1943. [51]

[Title of Supreme Court and Cause.]

OPINION OF THE COURT

Hon. A. M. Cristy, Judge.

Submitted June 22, 1945. Decided July 25, 1945.

Kemp, C. J., Peters and Le Baron, JJ.

Criminal law—instructions and reasonable doubt.

It is not error, in instructing upon reasonable doubt, to include the definition "a doubt that you could give a reason for."

Witnesses — credibility — cross examination for purposes of impeachment—former conviction of crime.

It is not error in the exercise of the right to impeach a witness, pursuant to the provisions of Revised Laws of Hawaii 1935, section 3831, to fix the time of the conviction of a witness by reference

to the time of an occurrence, evidence of which is before the jury.

Abortion—nature and elements of the offense.

A woman aborted is "with child" within the meaning of that term contained in Revised Laws of Hawaii 1935, section 6232, defining the crime of abortion, [53] although the fetus prior to expulsion has lost its vitality so that it could not mature into a living child. [54]

OPINION OF THE COURT BY PETERS, J.

This is a writ of error to review a judgment of conviction upon verdict of a jury of the crime of abortion. The following errors have been specified:

1. Error in instructing the jury, in defining a reasonable doubt, that such a doubt was one for which a reason could be given;

2. Error in permitting the prosecution, when defendant admitted having been convicted of a certain offense, to question him further over objection, with respect to said offense;

3. Error in refusing to instruct the jury at defendant's request that our criminal statute relating to abortion does not apply to acts to procure the miscarriage of a woman having a dead fetus in her womb.

The errors specified will be considered seriatim.

1. The language to which objection is made is but a part of the instruction given by the court

upon burden of proof, presumption of innocence and reasonable doubt. The instruction in full reads as follows: "I fruther instruct you that the burden of proof is upon the Territory and the law presumes the defendant to be innocent, and this presumption continues and attends him at every stage of the case until it has been overcome by evidence which proved him guilty to your satisfaction and beyond a reasonable doubt. And in this connection, I instruct you that the doubt which will entitle the defendant to an acquittal must be a reasonable doubt, not a conjured-up doubt, such a doubt as you might conjure up to acquit a friend, but a doubt that you could give a reason for. [55]

"A reasonable doubt is not a slight doubt, not a probable doubt, not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused, because everything relating to human affairs and depending upon *mortal* evidence is open to conjectural or imaginary doubt, and because absolute certainty is not required by law. The real question is whether after hearing the evidence and from the evidence you have or have not an abiding belief, amounting to a moral certainty that the defendant is guilty and if you have such belief so formed, it is your duty to convict and if you have not such belief so formed it is your duty to acquit."

The cases are in confiict upon the subject. The expression "a doubt for which a reason can be given," in more or less varying form, is found in instructions upon reasonable doubt given by trial

judges in federal courts.[1] In the cases cited in note one the propriety of the instruction was not questioned. In some jurisdictions similar instructions have been sustained.[2] In others they were held to constitute prejudicial error.[3] And in still others,

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[1] "* * * a doubt for which a reason may be assigned." U. S. v. Stephens, 27 Fed. Cas. 1314 (#16392). "* * * a doubt for which a good reason arising from the evidence, can be given." United States v. Johnson, 26 Fed. 82, 685. "* * * a doubt for which a good reason can be given, which reason must be based on the evidence, or the want of evidence." United States v. Jackson, 29 Fed. 503, 504; United States v. Cassidy, 67 Fed. 698, 782.

[2] "* * * a doubt for which you can give a reason." Wallace v. State, 41 Fla. 547, 580. It is "* * * a doubt which must arise from the evidence, or lack of evidence, and for which some reason can be given." Griggs v. United States, 9 C. C. A. 158, 572, 578. "* * * a doubt for which some good reason arising from the evidence can be given." The People v. Guidici, 100 N. Y. 503, 510, 3 N. E. 493, 495. "* * * a doubt for which a reason can be given, based on the evidence in the case.* * *." Butler v. The State, 102 Wis. 368, 78 N. W. 590, 591, citing Emery and another v. The State, 101 Wis. 627, 78 N. W. 145. "* * * such a doubt as the juror is able to give a reason for." State v. Grant, 20 S. D. 168, 105 N. W. 97, 99, citing State v. Serenson, 7 S. D. 277, 64 N. W. 130.

[3] "* * * a reasonable doubt is one for which a reason could be given based on the evidence or want of evidence in the case." Pettine v. Territory of New Mexico, 201 Fed. 489, 495 (C. C. A. 8th Cir.); Ayer v. Territory of New Mexico, 201 Fed. 497, 498 (C. C. A. 8th Cir.). "A reasonable doubt is such a doubt as the jury are able to give a reason for." State of Iowa v. Cohen, 108 Iowa, 208, 78 N. W. 857, 858; Siberry v. The State, 133 Ind. 677, 33 N. E. 681, 684. "It must be a ground of doubt for which a reason can

though criticized, the error, if any, was considered harmless.[4]

In the Michigan case the court made the following comment: "Conceding, in this case, that the exposition of the phrase by the circuit judge was not strictly accurate, yet it is apparent that it could have produced no practical consequence in this case." The Ohio court observed: "This objection does not impress us as of the highest consequence." The Oregon court said in conclusion: "The particular language in question may be, and no doubt is, subject to the criticism that it does not define, but needs defining, but we do not think it could have misled or perplexed the jury when considered in

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be given, which reason must be based upon the evidence or want of evidence." Owens v. United States, 130 Fed. 279, 283 (C. C. A. 9th Cir.). "* * * a doubt for the having of which the juror can give a reason derived from the testimony." Carr v. State, 23 Neb. 749, 751, citing Cowan v. State, 22 Neb. 519; see also Childs v. State, 34 Neb. 236, 51 N. W. 837. "* * * a doubt * * * for which you as reasonable men can give a good and sufficient reason." State v. Rosenberg, 97 N. J. 430, 433, 118 Atl. 207, 208; see also State v. Parks, 96 N. J. 360, 363. "* * * a doubt you can give a reason for." Abbott v. Territory, 20 Okla. 119, 94 Pac. 179.

[4] "* * * a doubt arising out of the facts and circumstances of the case in maintaining which you can give some good reason." People v. Stubenvoll, 62 Mich. 329, 334, 28 N. W. 883. "* * * a doubt for which you can give a reason." State v. Sauer, 38 Minn. 438, 439, 38 N. W. 355. "* * * a doubt as a juror can give a reason for." State v. Morey, 25 Ore. 241, 36 Pac. 573, 577. "* * * a doubt that you as a juror can give a reason for." Morgan v. The State, 48 Ohio 371, 27 N. E. 710, 712.

connection with the remainder of the instruction. If every criminal case is to be reversed for some technical inaccuracy in the definition of a reasonable doubt, then indeed the 'administration of justice becomes impracticable.' "

The question involved arises from the difficulty encountered by trial judges in presenting to juries in criminal cases instructions for their guidance in applying the rule of proof beyond a reasonable doubt. The degree of proof necessary to convict is complementary to the presumption of innocence and unless understood the presumption of innocence is of little protection to the accused. To instruct a jury merely that the defendant is presumed innocent until he is proved guilty beyond a reasonable doubt, while sufficient in itself to accord to him his substantial rights, has been thought by many courts, including those of Hawaii, to be insufficient as a guide to juries in arriving at their ultimate conclusions and they have attempted to define the term. These instructions have taken the form of a definition of the adjective "reasonable," the inclusion of instruction of what are not reasonable doubts and the time-honored test enunciated by Chief Justice Shaw in Commonwealth v. Webster, reported in 5 Cush. (Mass.) 295, 320.

The instruction in controversy is of this type. From long-continued use and uniform approval by this court when before it for review, it has assumed the dignity of a stock instruction. It came before this court in substantially the same form in 1889 in the case of The King v. Ahop, 7 Haw. 556, 560,

and was approved, the author of the opinion eruditely observing that the instruction was taken from the notes to Commonwealth v. McKie, 1 Leading Crim. Cases, pages 320, 321. It was also before this court in Territory v. [58] Robello, 20 Haw. 7, decided in 1910, and in Ter. v. Buick, 27 Haw. 28, decided in 1923, when again it was approved. While it does not appear that in any of those cases the particular error herein specified was advanced or discussed, the language giving rise to the present objection as an integral part of the definition of reasonable doubt was necessarily considered. It has also been subject to the judicial scrutiny of this court upon writ of error in three capital cases since the effective date of Laws of 1931, chapter 42, section 2, making it obligatory in case of a sentence of death to review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is assigned as error or not.[5]

To the legal mind it is difficult to formulate a satisfactory definition of the term "reasonable doubt." The difficulty seems to stem from the futile attempt to define the obvious. But instructions are addressed to the lay and not the legal mind. And measured by the purposes sought to be attained, the instruction complained of is, as a whole, as good as can be devised to convey to the lay mind the ordinarily accepted definition of reasonable doubt.

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[5]No. 2257, Territory v. Corum, No. 2466, Territory v. Alcosiba, No. 2454, Territory v. Gagarin.

"Burden of proof" is a term employed to indicate upon whom rests the duty of persuasion by proof. To persuade another is to convince such other that a thing is so. If convinced, such other possesses a settled belief that the thing is so. In criminal cases the burden of proof is directed to the persuasion of the trier of the facts of the guilt of the defendant of the offense charged. But due to the presumption [59] of innocence accorded persons accused of crime, the trier of the facts, before he may say he is convinced, must be satisfied of the defendant's guilt beyond all reasonable doubt. Hence it is that the measure of persuasion is spoken of as proof beyond a reasonable doubt, and the measure of the intensity of belief of the trier of the facts becomes the measure of persuasion. It is to communicate intelligibly to jurors a method of self-analysis for one's belief that instructions upon reasonable doubt are directed.

It may be taken as conceded by the defendant that with the elimination of the language "but a doubt that you could give a reason for" the instruction correctly states the law. The negative definitions contained therein unquestionably conform to the accepted definitions of what is not a reasonable doubt. They, similarly as the language objected to, are calculated to define the adjective "reasonable." Isolated phrases must be construed in the light of the context in which they appear. The meaning to be ascribed to the phrase "a doubt you could give a reason for" must necessarily be construed in the light of the negative definitions

given and as so construed harmonizes with the instruction as a whole. A doubt that one can give a reason for is unquestionably a reasonable doubt. A doubt that one cannot give a reason for is within the category of the negative definitions contained in the instruction. Both positive and negative definitions are directed to the mental operation of the jurors. It is a mental and not a demonstrable doubt to which the phrase refers. Instructions upon reasonable doubt are not given to supply individual jurors with material to meet adverse arguments of their fellow jurors. Nor are they calculated to enable the [60] individual juror to criticise the mental operations of another juror. A juror is not required to give his reasons to other jurors for his mental reactions or conclusions. The instruction was well calculated to assist the jury in applying the test, with which it concludes: "The real question is whether after hearing the evidence and from the evidence you have or have not an abiding belief, amounting to a moral certainty that the defendant is guilty." What to one man might be a slight, probable, possible, conjectural or imaginary doubt may, in all seriousness, be to another a reasonable doubt. Each juror, in his own way, is presumably making an honest effort to determine whether he entertains in his own mind a doubt of the defendant's guilt and if so whether such doubt is a conjectural or imaginary doubt or is one that has its basis in reason, one for which he can give a reason and therefore reasonable. If the intensity of his belief is such that he can say

he has an abiding belief amounting to a moral certainty of the guilt of the defendant, then the degree of persuasion has been met; otherwise not. Whatever the form of words employed, if the concepts of the language used are consistent with the ordinarily accepted meaning of the term "reasonable doubt" the instruction meets the test of definition. As said by Professor Wigmore: "The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of communicating intelligibly to a jury a sound method of self-analysis for one's belief. If this truth be appreciated, the Courts will cease to treat any particular form of words as necessary or decisive in the law for that purpose; for the Law cannot expect to do what Logic and Psychology have not yet done."[6] [61]

2. The following colloquy occurred upon cross-examination of the defendant as a witness on his own behalf:

"Q. Have you ever been convicted of drunkenness?

"A. Yes, once; once in a lifetime.

"Q. Once in a lifetime, you say, Doctor?

"A. Yes.

"Q. And that was right after this case? That was right after (name of prosecutrix omitted) went to the hospital? (Objection; objection overruled.)

"A. About a month after."

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[6]Wigmore, Ev. (3d ed.) § 2497, p. 325.

The prosecution urges that by this evidence there was presented to the jury the details of the offense of which the defendant had been convicted.

Whether the specification of error urged was preserved below is open to considerable doubt. No grounds of objection were alleged. Nor does it appear from the record what reasons, if any, were assigned for such objection. Moreover, no exception was alleged to the ruling of the court. Hence the error specified comes within the prohibition of Revised Laws of Hawaii, 1935, section 3563, as construed by this court in Ter. v. Gagarin, 36 Haw. 1.

Nevertheless, we have considered the question and find it to be without merit. It is competent under the provisions of Revised Laws of Hawaii, 1935, section 3831, for the prosecution to question the defendant upon cross-examination as to whether he had been convicted of any indictable or other offense.[7] His answer "once in a lifetime" not only implied infrequency but remoteness. The extent that the credibility of the defendant might be impaired by former conviction of an indictable or other offense would be affected accordingly as such conviction was recent or remote. It is, therefore, legitimate [62] for the prosecution to fix the time of conviction. This is sought to do by reference to an incident with which the jury was familiar; that is, the time when the prosecutrix went to the hospital. But it was to the time of the defendant's conviction and not to the time of his being drunk that the question was directed. The time of

[7]Ter. v. Goo Wan Hoy, 24 Haw. 741.

the conviction of offense is not a detail of the offense in the objectionable sense of improper cross-examination of the details of an indictable or other offense of which the witness had been convicted.

3. The court refused to give the following instruction, requested by the defendant: "I instruct you that the statutes on abortion are intended to prevent and punish the destroying of embryo human life, the germs of human life before birth, in the course of nature, and would not apply to acts to procure the miscarriage of a woman having a dead fetus in her womb."

We need only concern ourselves with that portion of the instruction that declares that the statutes on abortion would not apply to acts to procure the miscarriage of a woman having a dead fetus in her womb. If an incorrect statement of the law, the instruction was properly refused in toto.

Revised Laws of Hawaii, 1935, section 6232, defines the crime of abortion as follows: "Whoever maliciously, without lawful justification, administers, or causes or procures to be administered any poison or noxious thing to a woman when with child, in order to produce her miscarriage, or maliciously uses any instrument or other means with like intent, shall, if the woman be then quick with child, be punished by a fine not exceeding one thousand dollars and imprisonment at hard labor [63] not more than five years; and if she be then not quick with child, shall be punished by a fine not exceeding five hundred dollars, and imprisonment at hard labor not more than two years."

The gravemen of the crime of abortion, as de-

fined by section 6232, supra, is the malicious administration of drugs to or the use of instruments upon a woman with child in order to produce a miscarriage.

The term "with child" is not defined by the lexicographers. It is included in the definitions of the noun "pregnancy" and of the adjective "pregnant" and is often used synonymously with the latter term. The noun "miscarriage" is defined as "the act of bringing forth before the natural time; a premature birth; with women, the delivery of the fetus before the twenty-eighth week of pregnancy.[8] The verb "miscarry" is defined "to bring forth in child-birth prematurely; abort"[9]; "to suffer untimely delivery; to bring forth young prematurely; to give birth to a fetus which is not viable."[10] Where the abortion is for criminal purposes the word "miscarriage" carries the added implication of the unlawful interference with the course of pregnancy with the intent of destroying the product of conception.

The noun "miscarriage" obviously implies that the woman aborted is with child and the term "with child" qualifying [64] the noun "woman" might quite properly have been omitted from the statute. It apparently is present for the dual purpose of excluding from the condemnation of the statute

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[8]Funk & Wagnalls New Standard Dictionary (1929 ed.).

[9]Funk & Wagnalls New Standard Dictionary (1929 ed.).

[10]The Century Dictionary & Cyclopedia.

misconceived abortions, that is, abortions where the woman is not actually with child, and of defining the period within which the crime may be committed, that is, from the moment the womb is instinct with embryo life and gestation has begun until expulsion or delivery.[11] The latter consideration is confirmed by the degrees of punishment attached to the crime of abortion accordingly as the woman is quick with child or not. (§ 6232, supra.)

While the term "with child" similarly as the adjective "pregnant" ordinarily denotes vitality of the fetus, it also connotes a physical condition following conception and continuing until expulsion or delivery, irrespective of whether the fetus prior to expulsion has lost its vitality, so that it could not mature into a living child. The adjective "pregnant" has been so construed.[12] Nor do the definitions and connotations of the noun "miscarriage" exclude abortions of feti which prior to expulsion have lost their vitality so that they could not mature into living children. On the contrary, according to its ordinarily accepted meaning it has reference to premature birth, either spontaneous or induced, irrespective of the prior vitality of the fetus. [65]

Plaintiff in error places great reliance upon the case of Commonwealth v. Wood, 11 Gray (Mass.) 85. The statute under which the defendant was

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[11]Mills v. Commonwealth, 13 Pa. (1 Harris) 631, 632.

[12]State v. Howard, 32 Vt. 380, 398; State v. Tippie, 89 Ohio 35, 105 N. E. 75, 77; State v. Cox, 197 Wash. 67, 84 P. (2d) 357, 361.

prosecuted is not available in the library but is quoted in Commonwealth v. Brown, 14 Gray (Mass.) 419.

Although differently from our statute defining abortion, the Massachusetts statute used the adjective "pregnant" instead of "with child" in describing the woman aborted, it is otherwise sufficiently similar to our local statute to resort to decisions of that State construing its provisions as precedents. But the opinion of the court in the Wood case does not support the thesis that in order that the crime of abortion be complete the fetus must have had vitality up to the time of miscarriage. The question presented for review was whether the trial court had improperly refused an instruction upon lawful justification, a defense recognized by the Massachusetts statute, similarly as Revised Laws of Hawaii, 1935, sections 6232 and 6233. Under section 6232 the abortion to be criminal must be "without justification." Section 6233 absolves persons from criminal liability for abortion where the means used are for the purpose of saving the life of the woman. The trial court had refused an instruction that a lawful justification "would exist if the child with which Sarah Chaffie (the woman aborted) was pregnant was not a live child." And in considering the alleged error the appellate court, [6] among other things said: "If the defendant meant to say it would be a legal justication to show that the fetus with which the woman was pregnant had lost its vitality so it could not mature into a living child, we think the

decision correct and that the jury should have been so instructed, if there was any evidence before the jury upon the subject. But the bill of exceptions not only fails to state that any such evidence was given at the trial or offered, but expressly negatives the fact. If there had been evidence that the fetus had lost its vitality it might have been the duty of the judge to say directly to the jury that if they so found, the case was not within the statute. Upon the case by the bill of exceptions there was no occasion for any direction on the matter."

It would seem from the foregoing quoted language of the court that the vitality of the fetus was pertinent only as it might affect the defense of lawful justification and that the court did not hold as claimed by plaintiff in error that the woman was not pregnant within the meaning of the statute if the fetus had lost its vitality so that it could not mature into a living child. The Wood case is not persuasive to say the least. Not alone is it not in point, but is mere dicta and whatever implications it possessed they were neutralized by the subsequent amendment of the statute. (See Commonwealth v. Taylor, 132 Mass. 261, and Commonwealth v. Surles, 165 Mass. 59, 42 N. E. 502.)

The jury was fully instructed upon what constituted lawful justification within the exception of section 6232, supra, and upon the provisions of section 6233. The legal effect of these statutory provisions are not involved in the consideration of

the instruction, the subject of this specification of error.

Judgment affirmed.

F. PATTERSON and
E. J. BOTTS,
For Plaintiff in Error.

W. Z. FAIRBANKS,
Public Prosecutor, and

J. E. PARKS,
Assistant Public Prosecutor,
for Defendant in Error.

[Endorsed]: Filed July 25, 1945. [68]

[Title of Supreme Court and Cause.]

ORDER

Good cause appearing therefor, it is hereby ordered that plaintiff in error may have up to and including the 1st day of October, 1945, within which time to prepare and file with the clerk of the Circuit Court, 9th Circuit, the record on appeal in the the above entitled matter.

Dated: August 6, 1945.

/s/ S. B. KEMP,
Chief Justice, Supreme Court,
Territory of Hawaii.

[Endorsed]: Filed Aug. 6, 1945. [70]

In the Supreme Court of the Territory of Hawaii

No. 2544

THE TERRITORY OF HAWAII,
Defendant in Error,

vs.

PETER L. YOUNG,
Plaintiff in Error.

JUDGMENT ON WRIT OF ERROR

In the above entitled cause, pursuant to the opinion of the above entitled court rendered and filed on July 25, 1945, the assignments of error are overruled, the writs denied and the verdict and judgment below sustained.

Dated: Honolulu, Hawaii, August 13th, 1945.

By the Court:

[Seal] /s/ LEOTI V. KRONE,
Clerk.

Approved:

/s/ S. B. KEMP,
Chief Justice, Supreme Court.

Received a copy of the above Judgment this 13th day of August, 1945.

/s/ W. Z. FAIRBANKS,
Public Prosecutor, City and County of Honolulu.

[Endorsed]: Filed Aug. 13, 1945. [72]

[Title of Supreme Court and Cause.]

NOTICE OF APPEAL

1. Name and address of plaintiff in error: Peter L. Young, 3775 Old Pali Road, Honolulu, T. H.

2. Name and address of attorneys for plaintiff in error: Fred Patterson, McCandless Building, and E. J. Botts, Stangenwald Building, Honolulu, T. T.

3. Offense: Violation of Section 11652, Revised Laws of Hawaii, 1945, viz. the crime of abortion.

4. Date of Judgment: Supreme Court of Hawaii judgment Aug. 13, 1945.

5. Brief description of judgment or sentence: Tried before a jury in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, found guilty by the jury March 26, 1943, and thereafter sentenced to imprisonment by the Honorable A. M. Cristy, presiding judge, for a term of two years.

6. Plaintiff in error is released on bail.

7. Grounds for appeal: Plaintiff in error claims that the trial judge erred in instructing the jury upon reasonable doubt that it was "a doubt that you could give a [74] reason for."

I, the above named plaintiff in error, hereby appeal to the United States Circuit Court of Appeals

for the Ninth Circuit from the judgment above mentioned on the grounds set forth herein.

/s/ PETER L. YOUNG,
Plaintiff in Error.

Dated: August 13th, 1945.

Receipt of a copy of the foregoing Notice of Appeal is acknowledged this 13th day of August, 1945.

/s/ W. Z. FAIRBANKS,
Public Prosecutor.

[Endorsed]: Filed Aug. 13, 1945. [75]

In the Circuit Court of Appeals
For the Ninth Circuit

THE TERRITORY OF HAWAII,
Defendant in Error,

vs.

PETER L. YOUNG,
Plaintiff in Error.

ASSIGNMENT OF ERRORS

Comes now Peter L. Young, plaintiff in error in the above entitled matter, and files the following assignment of errors upon which he will rely in the prosecution of his appeal from the decision of the Supreme Court of the Territory of Hawaii.

Plaintiff in error was indicted by the grand jury for the crime of abortion, to-wit, Section 11652,

Revised Laws of Hawaii, 1945, and thereafter was tried for said crime in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, and at the conclusion of the evidence, the presiding judge gave the jury the following instruction:

"I further instruct you that the burden of proof is upon the Territory and the law presumes the defendant to be innocent, and this presumption continues and attends him at every stage of the case until it has been overcome by evidence which proves him guilty to your satisfaction and beyond a reasonable doubt. And in this connection, I instruct you that the doubt which will entitle the defendant to an acquittal must be a reasonable doubt, not a conjured up doubt, such as you might conjure up to acquit a friend, but a doubt that you could give a reason for. [77]

"A reasonable doubt is not a slight doubt, not a probable doubt, not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused, because everything relating to human affairs and depending upon moral evidence is open to conjectural or imaginary doubt, and because absolute certainty is not required by law. The real question is whether after hearing the evidence and from the evidence you have or have not an abiding belief, amounting to a moral certainty that the defendant is guilty and if you have such belief so formed, it is your duty to convict, and if you have not such belief so formed it is your duty to acquit;" and plaintiff in error says that the trial court erred

in instructing the jury that a reasonable doubt is "a doubt that you could give a reason for," and assigns as error the decision and opinion of the Supreme Court of the Territory of Hawaii in holding and deciding that said instruction was not error.

Wherefore, plaintiff in error prays that the decision and judgment of the Supreme Court may be reversed, and for such further relief as to the Court may seem just and proper.

Dated: Honolulu, Hawaii, August 13th, 1945.

PETER L. YOUNG

By FRED PATTERSON and
E. J. BOTTS

/s/ Per E. J. BOTTS
His Attorneys

Receipt of a copy of the foregoing Assignment of Errors is acknowledged this 13th day of August, 1945.

/s/ W. Z. FAIRBANKS
Public Prosecutor

[Endorsed]: Filed Aug. 13, 1945. [78]

In the Supreme Court of the
Territory of Hawaii

No. 2544

THE TERRITORY OF HAWAII,
Defendant in Error,

vs.

PETER L. YOUNG,
Plaintiff in Error.

CLERK'S STATEMENT OF DOCKET ENTRIES

1. Indictment for crime of abortion, viz. violation of Section 11652, Revised Laws of Hawaii, 1945, by the Grand Jury of the Territory of Hawaii, on October 15, 1942.

2. Arraignment before judge of the Circuit Court, First Judicial Circuit, October 16 and 17, 1942.

3. Plea of not guilty made and entered February 26, 1943.

4. Tried before a jury beginning March 16, 1943.

5. Verdict of guilty returned by jury March 22, 1943.

6. Judgment and sentence of trial court on March 26, 1943. Defendant being sentenced to imprisonment in Oahu Prison for a term of two years.

7. Writ of error issued out of the Supreme

Court of the Territory of Hawaii to the said Circuit Court on June 19, 1943.

8. Decision of the Supreme Court rendered July 25, 1945.

9. Judgment of Supreme Court filed and entered August 13, 1945.

Dated: August 13, 1945.

[Seal] /s/ LEOTI V. KRONE
Clerk, Supreme Court of the Territory of Hawaii.

[Endorsed]: Filed Aug. 13, 1945. [80]

[Title of Supreme Court and Cause.]

PRAECIPE

To the Clerk of the Supreme Court:

Please cause to be prepared and transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, certified copies of the following:

1. The indictment.

2. Instructions given by the court to the jury.

3. Trial court's minutes.

4. Writ of error from Supreme Court to Circuit Court, First Circuit.

5. Assignment of Errors in proceeding before Supreme Court.

6. Opinion of Supreme Court.

7. Judgment of Supreme Court.

8. Notice of Appeal and Appeal to Circuit Court of Appeals, Ninth Circuit.

9. Assignment of Errors.

10. Clerk's (Supreme Court) statement of docket entries.

Dated: August 13th, 1945.

PETER L. YOUNG
By FRED PATTERSON and
E. J. BOTTS
Per /s/ E. J. BOTTS
His Attorneys

[Endorsed]: Filed Aug. 13, 1945. [81]

[Title of Supreme Court and Cause.]

CLERK'S CERTIFICATE

I, Leoti V. Krone, clerk of the supreme court of the Territory of Hawaii, do hereby certify that the foregoing documents are full, true and correct copies of the originals on file in the above entitled court and cause, as follows:

1. Indictment, filed October 15, 1942;

2. Instructions given by the court to the jury;

3. Trial court's minutes;

4. Writ of Error from Supreme Court to cir-

cuit court first circuit (includes Application for Writ of Error) filed June 19, 1943;

5. Assignment of Errors in proceeding before Supreme Court, filed June 19, 1943;

6. Opinion of supreme court, filed July 25, 1945;

7. Order extending time for record on appeal to 9th circuit court of appeals, filed August 6, 1945;

8. Judgment of supreme court, filed August 13, 1945; [83]

9. Notice of Appeal and Appeal to 9th circuit court of appeals, filed August 13, 1945;

10. Assignment of Errors, filed August 13, 1945;

11. Supreme Court Clerk's statement of docket entries, filed August 13, 1945;

12. Praecipe, filed August 13, 1945.

I further certify that the cost of the foregoing transcript of record on appeal to the ninth circuit court of appeals is $69.65, and that the said amount has been paid by E. J. Botts, one of the attorneys for plaintiff in error.

In Witness Whereof, I have hereunto set my hand and the seal of the supreme court of the Territory of Hawaii, at Honolulu, Hawaii, this 6th day of September, 1945.

[Seal] LEOTI V. KRONE
Clerk, Supreme Court, Territory of Hawaii. [84]

[Endorsed]: No. 11144. United States Circuit Court of Appeals for the Ninth Circuit. Peter L. Young, Appellant, vs. Territory of Hawaii, Appellee. Transcript of Record. Upon Appeal from the Supreme Court for the Territory of Hawaii.

Filed September 24, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11144

PETER L. YOUNG,

Appellant,

vs.

THE TERRITORY OF HAWAII,

Appellee.

DESIGNATION OF PARTS OF RECORD TO BE PRINTED AND POINTS RELIED ON

Comes now Peter L. Young, appellant, by Fred Patterson and E. J. Botts, his attorneys, and hereby requests that the record be printed in its en-

tirety, and appellant adopts as his points on appeal the assignment of errors appearing in the record.

Dated: Honolulu, Hawaii, October 22, 1945.

PETER L. YOUNG,
Appellant

By FRED PATTERSON and
E. J. BOTTS

Per [Illegible]
His Attorneys

Copy served on William Z. Fairbanks, Public Prosecutor, by mail this 22nd day of October, 1945.
[Illegible]

[Endorsed]: Filed Oct. 24, 1945. Paul P. O'Brien, Clerk.